In the

United States

Court of Appeals

For the Ninth Circuit

ROBERT J. SHEEHAN, *Appellant*,

v.

LAWRENCE DELMORE, JR., Superintendent of Washington State Penitentiary at Walla Walla, Washington, *Appellee*.

14682

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAMUEL M. DRIVER, JUDGE

BRIEF OF APPELLEE

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JURISDICTION

The appellee will accept the jurisdiction of the Circuit Court of Appeals to hear this appeal.

STATEMENT OF THE CASE

Appellee will agree with the fact that the appellant was arrested on April 27, 1952, and that on April 29, 1952, the appellant was arraigned in Clark

County superior court under Cause No. 5163 following the filing of a criminal information charging appellant with the crime of robbery and that subsequent thereto appellant did plead guilty and on May 15, 1952, was sentenced to a term of not less than five years nor more than twenty years imprisonment in Washington State Penitentiary at Walla Walla, Washington.

Appellee further agrees that pursuant to a proper order of the Clark County superior court the appellant was returned to that jurisdiction and on the 10th day of December, 1952, a corrected judgment and sentence was entered on the motion of the state of Washington. Such corrected judgment and sentence is a part of the record.

It is true that appellant was adjudged guilty by the court after a plea of guilty by appellant without the assistance of counsel on April 29, 1952. However, this statement on face value would appear to mean that the appellant had been denied the right to counsel which, of course, is not in accordance with the facts. The court asked the appellant specifically whether or not he wished to consult with an attorney before he pleaded and appellant replied that he did not believe it would be necessary (Tr. 17). The court further advised him of his right to have a twenty-four hour delay in making his plea and to consult an attorney if he wished, and again appellant did not wish counsel. (Tr. 17.) Further, the court went into some discussion of the case with a Mrs. Hulet,

who had been charged together with appellant, concerning her rights to have an attorney, and subsequently thereto appointed counsel for her (Tr. 20, 21). Appellant was present during this colloquy. Now the appellant alleges a denial of the right to counsel in part because he was not asked specifically by the court the same as Mrs. Hulet. This, however, is untrue. He certainly was apprised of his right to counsel and the fact that the court would provide counsel at its expense if the appellant could not stand the expense.

This question was decided by the supreme court of the State of Washington and by the federal district court from which this appeal has been taken. The supreme court, after the matter had been presented to it by petitioner and appellee herein, found in Cause No. 32753 entitled "*Robert J. Sheehan, Petitioner v. John R. Cranor, Superintendent of Washington State Penitentiary*" in part that

> "It further appearing that in imposing sentence the court fixed a minimum term as well as a maximum term of service, and later the petitioner was returned to the court and resentenced for a maximum term.
>
> "The court finds from the matters and things presented to it that no right guaranteed the petitioner by either the constitution of the state of Washington or the constitution of the United States has been denied to him in connection with his arrest, arraignment, or entry of plea of guilty, or the judgment and sentence entered and imposed;" (Tr. 58.)

This order denying the writ was signed by the Honorable Thomas E. Grady, then Chief Justice.

Appellee submits that the question as propounded by appellant is not completely accurate and that the question involved is whether there is a denial of due process of law to one who has been adjudged guilty and sentenced, by subsequently not allowing him to withdraw his plea of guilty and be rearraigned without the benefit of counsel to argue the motion to change the plea.

ARGUMENT

The appellant in stating his question, says "Is it a denial of due process to refuse to allow one who is held under a void sentence to withdraw his plea of guilty before he is resentenced?" To this question appellee takes exception because it is the conclusion of the appellant, and the appellant alone, that he was held under a void sentence. Appellee submits that as a matter of fact the appellant was not held under a void sentence, but at most he was held under a sentence that was erroneous in that it did not prescribe the sentence which was fixed by the laws and statutes of the State of Washington. The statute relative to robbery in the State of Washington is found in RCW 9.75.010 and reads as follows:

> "Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the per-

son or property of a member of his family, or of anyone in his company at the time of the robbery.

"Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. If used merely as a means of escape, it does not constitute robbery.

"Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

"Every person who commits robbery shall be punished by imprisonment in the state penitentiary for not less than five years."

It will be noticed that this section of our criminal law, which was passed in the 1909 session of the legislature by chapter 249, section 166, prescribed a penalty of not less than five years' imprisonment in the state penitentiary. However, in 1935, our legislature, as amended by the legislature of 1947, passed the following section of our criminal law, that is RCW 9.95.010 which reads as follows:

"When a person is convicted of any felony, except treason, murder in the first degree, or carnal knowledge of a child under ten years, and a new trial is not granted, the court shall sentence such person to the penitentiary, or, if the law allows and the court sees fit to exercise such discretion, to the reformatory, and shall fix the maximum term of such person's sentence only.

"The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was con-

> victed, if the law provides for a maximum term. If the law does not provide a maximum term for the crime of which such person was convicted the court shall fix such maximum term, which may be for any number of years up to and including life imprisonment, but in any case where the maximum term is fixed by the court it shall be fixed at not less than twenty years."

It will be noticed that by this section the court is directed to fix a sentence in such a case as robbery to a maximum sentence only of twenty years' imprisonment. This section was held to be constitutional and to be applicable in *State v. Seabrands*, 191 Wash. 472. Thus, it is abundantly clear that the proper action of the court in the instant case would have been to sentence the appellant, as he was finally sentenced in December, to a twenty year sentence only, instead of the five to twenty year sentence as originally set. But, the question then arises whether or not this sentence is void. The appellee submits that it is not void and in *Siipola v. Cranor*, 38 Wn. (2d) 848, our supreme court found that

> "We find merit in only one of petitioner's contentions, i.e., that the trial court should have sentenced him to a maximum of not more than fifteen years, rather than a maximum of not more than ten years. But this error does not, as petitioner contends, render the judgment void. Rem. Supp. 1947, § 10249-2, provides that the trial court shall impose the maximum sentence provided by law for the crime for which a defendant is convicted. The maximum penalty provided for grand larceny by Rem. Rev. Stat., § 2605 [P.P.C. § 117-55], is fifteen years' confinement in the state penitentiary. But, in *In re*

Bass v. Smith, 26 Wn. (2d) 872, 176 P. (2d) 355, where a sentence less than the maximum sentence was imposed, disregarding Rem. Supp. 1947, § 10249-2, we held:

"'While the judgment was deficient, it was not absolutely unauthorized, or of an entirely different character from that authorized by law. The judgment was erroneous, in that it did not impose a sentence of not less than twenty years, as provided by Rem. Rev. Stat. (Sup.), § 10249-2, but it was not absolutely void.'

"That case is determinative of petitioner's contention here; although the sentence was deficient, the judgment is not void.

"It is therefore the order of this court that the demurrer to the petitioner's application for a writ of *habeas corpus* be sustained and the application dismissed. It is further ordered that petitioner, Nels Siipola, be returned to the superior court for Clallam county for the purpose of resentencing in accordance with Rem. Supp. 1947, § 10249-2."

cf. Siipola v. Ness (1950) 90 F.S. 18. Our court has also stated that the trial courts cannot fix sentences at less than twenty years for conviction of a felony where no maximum term is fixed by statute. See *State v. Mulcare*, (1937) 189 Wash. 625, 66 P. (2d) 360. Further, our court has stated that under the law of this state it is mandatory that the trial court in sentencing, fix the maximum term only and the duty of the Board of Prison Terms and Paroles is to set the minimum term within six months following incarceration. *In re Pierce*, 1948 (31 Wn. (2d) 52).

Proceeding then, with the proposition that at no time was the appellant held under a void sentence, but only an erroneous one, the question is then whether

or not there was a denial of due process if, in fact, the court did deny the petitioner the right to the assistance of counsel at the time of resentencing procedure in December of 1952. Nowhere in the records compiled by the reporter who transcribed the proceedings is it apparent that the appellant at any time asked the court formally to either set aside the judgment and sentence and allow a new plea or specifically ask to be allowed counsel to represent him on the resentencing procedure. However, it must be admitted that on direct examination in the Federal District Court proceedings the deputy prosecuting attorney did state as follows (taken from trial transcript, pages 38 and 39):

> "A I recall, listening to Mr. Sheehan's testimony, that he did make a statement in regard to his father's ship and that he did request time for appointment of counsel.
>
> "Q Do you recall whether he asked to have counsel appointed or was he going to have counsel brought down?
>
> "A He was going to have counsel brought down. I didn't mean appointed, I meant brought down.
>
> "Q His father was when his ship came in?
>
> "A I recall some discussion about a ship not being in and that sort of thing.
>
> "Q Was this discussion off the record?
>
> "A Pardon?
>
> "Q Was the discussion off the record, or do you know about that?
>
> "A No, as I recall, I believe the court was in session."

This is buttressed by the so-called affidavits of the petitioner (Tr. pages 20 and 29). However, so far as the record shows, the only purpose for having Mr. Stewart appear was to have him recommend leniency on behalf of appellant although pursuant to Washington law one convicted of two felonies must serve a seven and one-half year minimum term on the second conviction without possibility of suspension or probation.

At the time of the proceedings on December 10, 1952, the petitioner had already been adjudged guilty. The judgment, so far as the guilt or innocence of the petitioner is concerned, was already a matter of fact and of record. The only thing left for the court to do was to enter the proper sentence pursuant to the judgment that had been rendered against the defendant. The judgment at no time was erased from the records, only the sentence. The question of whether or not one may withdraw a plea of guilty after having entered it is covered by RCW 10.40.170 which reads as follows:

> "The plea of guilty can only be put in by the defendant himself in open court. At any time before judgment, the court may permit the plea of guilty to be withdrawn and other plea or pleas substituted."

Our court has had many occasions to interpret this statute and in *In re Brandon v. Webb*, 23 Wn. (2d) 155, the court said:

> "[2] A plea of guilty has the same effect in law as a verdict of guilty, except that, upon leave of the court, it may be withdrawn and

another plea substituted therefor at any time before the rendering of final judgment and sentence thereon. [citing cases]"

And, in *State v. Hensley*, 20 Wn. (2d) 95, at page 101, the court said:

"[3] We have uniformly held that, under that section, the application to withdraw the plea of guilty is addressed to the sound discretion of the trial court, to be exercised liberally in favor of life and liberty, but that when such discretion has been exercised the action of the court will not be disturbed, on appeal, except upon a showing of abuse of the court's discretion. [citing cases]

"If appellant's original motion for permission to change his plea was in fact *denied* by the former judge, of which fact there is some evidence in the record, such action by the court was an exercise of its discretion, and there is no showing of any abuse of that discretion. As already stated, there was originally no affidavit supporting the motion, and the court was compelled to rely wholly upon the oral argument of counsel."

And in *State v. Jessing*, 144 Wash. Dec. 419, at page 421, the court said:

"[1] At any time before entry of judgment, the trial court may permit a plea of guilty to be withdrawn and other plea or pleas to be substituted. RCW 10.40.170. Appellant's motion to withdraw his plea of guilty having been made prior to the entry of judgment, it was timely made.

"[2] Motions of this kind are addressed to the sound discretion of the trial court, to be exercised liberally in favor of life and liberty. When such discretion has been exercised, the action of the trial court will not be disturbed

> on appeal, except upon a showing of abuse of discretion. *State v. Rose*, 42 Wn. (2d) 409, 256 P. (2d) 493, and cases cited therein."

Also see *State v. Horner*, 21 Wn. (2d) 278, and *State v. McDowall*, 197 Wash. 323. In the latter case the prisoner contended vigorously that the trial court had abused its discretion in denying the motion to withdraw his plea of guilty. The court said on page 329:

> "This section is permissive, and confers upon the superior court authority to permit the withdrawal of a plea of guilty. This section, then, vests the court with authority, in the exercise of its sound discretion, to permit a change of plea. The matter of the withdrawal of a plea once entered rests peculiarly within the discretion of the court. A ruling made in the exercise of such discretion will not be reversed, save for manifest abuse."

The petitioner has relied upon a case from the supreme court of the state of Washington which, it is felt by appellee, is being improperly used and cited. This is the case of *Thorne v. Callahan*, 39 Wn. (2d) 43. In that case, Thorne had been arrested and confined in the county jail at Everett. The arrest took place on June 3, 1950, and at 9:30 A. M. on June 6, 1950, the petitioner was brought before the court. On June 4, Thorne had been visited by a deputy prosecuting attorney who advised him that his wife had accused him of carnal knowledge of his nine year old daughter. Thorne apparently had no knowledge of any events which had occurred because of a drunken condition. The prosecutor then

advised Thorne that it was a serious crime and that he could be sentenced to as much as twenty years confinement so that it would be better for him to plead guilty in which case the prosecutor would recommend a light sentence and he would not have to serve more than one year. He further advised him that Thorne should answer "No" to the question of whether or not he wished the advice of counsel when asked by the court and that when the information was read he should plead guilty. Note that the prosecuting attorney undertook to advise Thorne of the accusation, the person making the accusation, the possible sentence which was stated as a maximum and the possible minimum he might be required to serve. Notice also that these statements were made although the prosecutor must have known that the wife could not testify, that carnal knowledge of a child under ten years of age was a mandatory life sentence and that there would not have been a minimum recommendation or a parole, at least not at that time. The court reversed the conviction and made many far reaching statements. However, the appellee urges that notwithstanding the statements made by the court, they were not speaking generally, but only about the case that was then before it. At page 60, the court said:

> "* * * However, if they (here the court is speaking of the prosecuting officials) undertake to give them legal advice, it must be accurate and not misleading as to all matters encompassed therein. If they either intentionally or unintentionally fail to state such matters

> correctly, they assume the risk of the possible invalidity of a sentence thereafter imposed where a prisoner who is without counsel may be sentenced to life imprisonment in the penitentiary. * * *"

The appellant has alleged that his plea of guilty was obtained by certain acts of the prosecuting attorney, among them being false and misleading legal advice. The prosecuting attorney denies having falsely misled or advised the petitioner in his affidavit and the appellee would like to point out to the court in support of the truth of Mr. Blair's affidavit, that the petitioner spent from six to seven months in Washington State Penitentiary prior to the resentencing procedure. During this time he had the benefit of the "learned counsel" incarcerated at Walla Walla, and, although being advised that he had been denied certain constitutional rights, nevertheless at the resentencing procedure at a time when he knew of this denial he made absolutely no mention of the fact to the court in support of the position he now takes. The answer, it would seem, is obvious. Mr. Blair was present at that time.

CONCLUSION

It is respectfully submitted that the findings of the supreme court of the state of Washington and the United States federal district court are correct, and that at no time during the state trial court proceedings was the petitioner denied any constitutional right. The judgment of the district court should be affirmed.

Respectfully submitted,

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